December 2007

Collier Bankruptcy Case Update

CURRENT BANKRUPTCY CASES ANALYZED

December 3, 2007 Issue 1

Cases of Particular Interest in This Issue

Debtor engaged in timber sales was not a single asset real estate debtor and was not subject to expedited proceedings.
HOC Group of Timber Noteholders v. Pacific Lumber Co. (In re Scotia Pac. Co. LLC) (5th Cir. November 13, 2007) (Commercial) **1207-004**

Inclusion of negative equity in financing defeated purchase money security interest status and allowed for bifurcation of debt.
In re Mitchell (Bankr. M.D. Tenn. November 13, 2007) (Consumer) **1207-022**

Japanese bankruptcy trustee in foreign main proceeding not required to obtain an order before proceeding against debtor's property in the United States.
Iida v. Kitahara (In re Iida) (BAP. 9th Cir. September 26, 2007) (Consumer) **1207-025**

Award of damages against IRS for emotional distress due to violation of discharge injunction vacated due to lack of specific waiver of sovereign immunity.
In re Torres (Bankr. D PR. October 9) (Consumer) **1207-026**

For the latest bankruptcy news, click on the links below
Bankruptcy Practice Area Page at lexis.com

LexisNexis

QUESTIONS OR COMMENTS ABOUT THIS PUBLICATION?

For questions about the Editorial Content appearing in this publication or reprint permission, please call:
Kent K.B. Hanson, Esq. ..... 1-800-252-9257 (ext. 2247)
Julia Steele Reid ..... 1-800-252-9257 (ext. 2579)
or e-mail us at ..... CollierCaseUpdate@lexisnexis.com

For assistance with subscriptions, shipments, billing or other customer service matters, please call:
Your account manager or 1-800-833-9844
Outside the United States and Canada, please call 518-487-3000

This publication is designed to provide accurate and authoritative information in regard to the subject matter covered. It is sold with the understanding that the publisher is not engaged in rendering legal, accounting, or other professional services. If legal advice or other expert assistance is required, the services of a competent professional should be sought.

LexisNexis and the Knowledge Burst logo are registered trademarks, and Michie is a trademark of Reed Elsevier Properties Inc., used under license. Matthew Bender is a registered trademark of Matthew Bender Properties Inc. Collier on Bankruptcy is a registered trademark of Matthew Bender & Company, Inc.

Copyright © 2007 Matthew Bender & Company, Inc., a Member of the LexisNexis Group. All rights reserved.

No copyright is claimed in the text of statutes, regulations, and excerpts from court opinions quoted within this work. Permission to copy material exceeding fair use, 17 U.S.C. § 107, may be licensed for a fee of $1 per page per copy from the Copyright Clearance Center, 222 Rosewood Drive, Danvers, MA 01923, telephone (978) 750-8400.

For more information, click on this link to visit the **LexisNexis™ Bookstore**.

For more information on ***Collier on Bankruptcy***, click on the banner below.

The most trusted name in bankruptcy law research –
Collier on Bankruptcy®
Available exclusively from LexisNexis™

POST-2005 ACT CASES IN THIS ISSUE

2d Circuit

§ 1325 Above median debtor with lack of current disposable income was not required to adhere to five year applicable commitment period.
In re Green (*Bankr. N.D.N.Y. August 29, 2007*) (*Consumer*)..... 1207-018

3d Circuit

§ 1301(c) Relief from stay and co-debtor stay granted to allow ejectment proceedings against debtor and spouse.
In re Dunlop (*Bankr. E.D. Pa. October 16, 2007*) (*Consumer*)..... 1207-016

4th Circuit

§ 330(a)(3) Counsel fees awarded in reduced amount where case was not extraordinary and attorneys had not filed administrative expense claim for pre-apppointment services.
In re Ameritex Yarn, LLC (*Bankr. M.D.N.C. October 5, 2007*) (*Commercial*) 1207-002

§ 362(c)(3)(B) Extension of stay in second case that was filed to avoid consent judgment denied due to debtor's inability to fund plan and effect of delay on creditors.
In re Folger (*Bankr. M.D.N.C. October 16, 2007*) (*Consumer*) 1207-003

5th Circuit

§ 101(18) Chapter 12 debtor with less than 50% of debt arising from farming operation given time to convert to chapter 13 prior to dismissal.
In re Quillian (*Bankr. S.D. Tex. October 15, 2007*) (*Commercial*) 1207-001

§ 362(d)(3) Debtor engaged in timber sales was not a single asset real estate debtor and was not subject to expedited proceedings.
HOC Group of Timber Noteholders v. Pacific Lumber Co. (In re Scotia Pac. Co. LLC)
(*5th Cir. November 13, 2007*) (*Commercial*)..... 1207-004

§ 1325(a)(5)(B) Release of lien language could not be included in chapter 13 plan.
In re Garcia (*Bankr. N.D. Tex. November 9, 2007*) (*Consumer*) 1207-024

6th Circuit

§ 707(b)(3) Chapter 7 case ordered converted to chapter 13 or converted on grounds of abuse where debtors spent tax refund on personal items and sought to maintain expensive home at expense of unsecured creditors.
In re Hoelzel (*Bankr. N.D. Ohio September 27, 2007*) (*Consumer*) 1207-015

§ 1325(a) Inclusion of negative equity in financing defeated purchase money security interest status and allowed for bifurcation of debt.
In re Mitchell (*Bankr. M.D. Tenn. November 13, 2007*) (*Consumer*)..... 1207-022

8th Circuit

§ 523(a)(15) Property settlement that was not a domestic support obligation was a general unsecured claim.
In re Dankert (*Bankr. D. Neb. September 27, 2007*) (*Consumer*) 1207-011

§ 523(a)(6) Removal of parts from truck caused damage to collateral so that debt was nondischargeable.
Bank of Iberia v. Jeffries (In re Jeffries) (*Bankr. W.D. Mo. October 17, 2007*) (*Consumer*) 1207-008

§ 523(a)(6) Breach of contract was not an intentional tort and did not render debt nondischargeable.
Grobel v. Johnson (In re Johnson) (*Bankr. D. Minn. November 14, 2007*) (*Consumer*)..... 1207-010

§ 553(a) Creditor not entitled to relief from stay to exercise alleged right of setoff against debtor spouse's savings account.
In re Moore (*Bankr. W.D. Ark. October 5, 2007*) (*Consumer*) 1207-012

§ 707(b) Debtor could claim full amount of debt payments on house that was intended for surrender.
In re Pilarski (*Bankr. D. Minn. November 14, 2007*) (*Consumer*)..... 1207-013

§ 707(b) Expensive vehicle leases of cars used to transport show dogs for debtor husband's low paying job would prevent payment to unsecured creditors and resulted in bad faith dismissal.
In re Worrel (*Bankr. N.D. Iowa November 9, 2007*) (*Consumer*)..... 1207-014

9th Circuit

§ 510(b) Proofs of claim for breach of contract and fraud relating to purchase of memebrship interests in debtor subordinated to those of equity holders.
Margaret B. McGimsey Trust v. USA Capital Diversified Trust Deed Fund, LLC (In re Consumer USA Comm'l Mtg. Corp.) (*B.A.P. 9th Cir. August 15, 2007*) (*Commercial*)..... 1207-006

§ 1307(c) Case filed twelve days after dismissal of prior case dismissed with three-year filing ban due to bad faith.
In re Craighead (*Bankr. N.D. Cal. October 16, 2007*) (*Consumer*)..... 1207-017

§ 1325(a) Creditors' objections to confirmation overruled where plan specifically accepted amounts including interest as set forth on proof of claim.
In re Hayes (*Bankr. D. Mont. October 12, 2007*) (*Consumer*)..... 1207-019

§ 1325(a)(3) Confirmation denied due to failure of plan to account for inheritance, debt counseling refund, or portions of IRA.
In re Chavez (*Bankr. D. Mont. October 11, 2007*) (*Consumer*)..... 1207-023

§ 1506 Japanese bankruptcy trustee in foreign main proceeding not required to obtain an order before proceeding against debtor's property in the United States.
Iida v. Kitahara (In re Iida) (*B.A.P. 9th Cir. September 26, 2007*) (*Consumer*)..... 1207-025

11th Circuit

§ 365 Lease which was terminated by landlord who received eviction order was not subject to assumption.
In re Key Largo Watersports, Inc. (*Bankr. S.D. Fla. August 10, 2007*) (*Commercial*)..... 1207-005

§ 522(p)(2)(B) Transfer of homestead interest from one property to another in the same state did not trigger limit.
Venn v. Reinhard (In re Reinhard) (*Bankr. N.D. Fla. October 16, 2007*) (*Consumer*)..... 1207-007

§ 523(a)(6) State court judgment based on debtor's willful and malicious exercise of dominion and control over creditor's collateral was nondischargeable.
Citicorp Leasing, Inc. v. DeMeo (In re DeMeo) (*Bankr. S.D. Fla. October 15, 2007*) (*Consumer*)..... 1207-009

§ 1325(a) Purchase money security interest in 910 vehicle could not be bifurcated once cost of GAP insurance was deducted.
In re Honcoop (*Bankr. M.D. Fla. September 19, 2007*) (*Consumer*)..... 1207-020

§ 1325(a) Hangning paragraph did not apply to financing that included negative financing and GAP insurance so that claim could be bifurcated.
In re Blakeslee (*Bankr. M.D. Fla. September 19, 2007*) (*Consumer*)..... 1207-021

PRE-2005 ACT CASES IN THIS ISSUE

1st Circuit

§ 106 Award of damages against IRS for emotional distress due to violation of discharge injunction vacated due to lack of specific waiver of sovereign immunity.
In re Torres (*Bankr. D.P.R. October 9*) (*Consumer*)..... 1207-026

§ 362 Widow and son wilfully violated stay by pursuing rent collection and eviction.
Vidal v. Alvarado (*D.P.R. October 26, 2007*) (*Consumer*)..... 1207-027

5th Circuit

§ 551 Trustee could not use section 551 to cure defective judgment lien.
Lowe v. Tex. Comptroller of Public Accounts (In re Crump) (*W.D. Tex. August 15, 2007*) (*Consumer*) 1207-033

7th Circuit

§ 522(g) Voluntary fraudulent transfer of debtor's interest in entireties property to spouse could be avoided and property could be sold by trustee.
Maxwell v. Barounis (In re Swiontek) (*Bankr. N.D. Ill. October 3, 2007*) (*Consumer*)..... 1207-028

§ 523(a)(2)(B) Bankruptcy court properly ruled that accounts receivable list provided to lender was not materially false or intended to deceive and that debt was dischargeable.
Fischer Inv. Capital, Inc. v. Cohen (In re Cohen) (*7th Cir. November 9, 2007*) (*Commercial*)..... 1207-029

§ 1141(a) Creditors' state court actions were barred by plan confirmation but were not grounds for sanctions.
In re Jedlink (*Bankr. C.D. Ill. October 17, 2007*) (*Consumer*) 1207-035

8th Circuit

§ 547(b) Mortgage refinance was preferential transfer as trustee's hypothetical judicial lien intervened between original mortgage and refinance.
Brown v. Community Nat'l Bank (In re Martinous) (*Bankr. W.D. Mo. October 17, 2007*) (*Consumer*)..... 1207-031

9th Circuit

§ 523(a)(15) Property settlement obligations in debtor's divorce decree were dischargeable in no asset, no bar date chapter 7 case.
Robuck v. Robuck (Robuck) (*Bankr. D. Mont. October 12, 2007*) (*Consumer*) 1207-030

10th Circuit

§ 547(c)(1) Funds received by creditor to be held in trust were preferential not protected by earmarking doctrine from recovery.
Rupp v. Mayberry (In re Crocker Cos.) (*D. Utah November 8, 2007*) (*Consumer*) 1207-032

§ 727(a)(4)(A) Debtor's failure to disclose assets and material omissions justified denial of discharge but co-debtor spouse was granted a discharge.
Wieland v. Harvey (In re Harvey) (*Bankr. N.D. Okla. October 16, 2007*) (*Consumer*)..... 1207-034

11 U.S.C. (Post-2005 Act)

§ 101(18) Definitions; "Family Farmer".

1207-001 (**Commercial**) **Chapter 12 debtor with less than 50% of debt arising from farming operation given time to convert to chapter 13 prior to dismissal.** (*Bankr. S.D. Tex.)*

PROCEDURAL POSTURE: Movant creditors filed a motion to dismiss a chapter 12 bankruptcy petition on the ground that respondent debtor did not qualify as a debtor.

OVERVIEW: The creditors had a $1,000,000 judgment against the debtor for intentional tortious conduct, conversion, and breach of fiduciary duty as a guardian of a probate estate. The debtor's other secured claim was $12,000 for the purchase of a boat and motor. He had $80,908 in unsecured claims. The court found that the debtor did not qualify as a debtor under 11 U.S.C. §§ 1201 *et seq*., and, thus, qualify for chapter 12 relief under 11 U.S.C. § 101(18) because less than 50 percent of his debt arose out of a farming operation owned or operated by him. However, the court allowed the debtor time to convert his case to another chapter of the Bankruptcy Code under which he was eligible. The court held that the debtor's use of the funds misappropriated from the probate estate in his farming operation was not considered in his qualification as a family farmer. The court held that the creditors' filing of the abstract of judgment did not convert the debt into a debt for the principal residence and that their judgment lien had no relation to the acquisition of his principal residence and could not be excluded from the eligibility calculation.

In re Quillian*, 2007 Bankr. LEXIS 3677 (Bankr. S.D. Tex. October 15, 2007) (Schmidt, B.J.).*
***Collier on Bankruptcy, 15th Ed. Revised* 2:101.18**

§ 330(a)(3) Compensation of Officers; Determination of Amount; Factors to Be Considered.

1207-002 (**Commercial**) **Counsel fees awarded in reduced amount where case was not extraordinary and attorneys had not filed administrative expense claim for pre-apppointment services.** (*Bankr. M.D.N.C.)*

PROCEDURAL POSTURE: A chapter 7 petition was entered against a debtor. The debtor consented to entry of an order of relief, and converted the case to a chapter 11 proceeding. Counsel for the committee of unsecured creditors (the Committee) filed an application for interim compensation and reimbursement for a six week period. Counsel also sought establishment of procedure for the submission of subsequent applications.

OVERVIEW: The debtor, a privately held company that had owned two yarn spinning plants, had begun liquidating assets before the involuntary chapter 7 petition was filed. When the matter was converted to a chapter 11 proceeding, the Committee was appointed and the Committee was permitted to retain counsel *nunc pro tunc* to May 2, 2007. Before being employed as counsel for the Committee, counsel had provided prepetition services to one of the creditors. The fees requested for the period from April 13, 2007 through May 31, 2007 totalled $41,873, but counsel voluntarily reduced the requested amount to $33,595 plus expenses. Counsel could not recover for their services rendered prior to the effective date of the appointment because counsel had not filed a claim for an administrative expense under 11 U.S.C. § 503. Pursuant to 11 U.S.C. § 330(a)(3), the court found that there was nothing extraordinary in the case or the work that required rates beyond those typically awarded to top attorneys in the district. Considering all of the Johnson factors, the court reduced the hourly rates requested and determined that many of the proceedings did not require the skills of more than one attorney.

In re Ameritex Yarn, LLC*, 2007 Bankr. LEXIS 3668 (Bankr. M.D.N.C. October 5, 2007) (Carruthers, B.J.).*
***Collier on Bankruptcy, 15th Ed. Revised* 3:330.04[1]**

§ 362(c)(3)(B) Automatic Stay; Duration; Cases Refiled Within One Year of Dismissal of Single Prior Case; Extension.

1207-003 (**Consumer**) **Extension of stay in second case that was filed to avoid consent judgment denied due to debtor's inability to fund plan and effect of delay on creditors.** (*Bankr. M.D.N.C.)*

PROCEDURAL POSTURE: A debtor filed a motion to extend the automatic stay under 11 U.S.C. § 362.

OVERVIEW: Three months after his previous bankruptcy case was dismissed, the debtor filed the present case. The court denied his motion to extend the automatic stay. A presumption arose that the case was not filed in good faith because the previous case was pending and dismissed within a year prior to the present case and there were no substantial positive changes in the debtor's financial or personal affairs after the dismissal. The court, considering the totality of the circumstances, held that the debtor failed to present clear and convincing evidence to rebut the presumption under section 362(c)(3)(B) because, in the three months after the dismissal of the previous case for failure to comply with the confirmed plan and for converting funds from two elderly individuals, the debtor incurred more debt of $800,000 through a consent judgment and nonpayment of taxes and did not attempt to repay; he filed bankruptcy to avoid the debt under the consent judgment; the creditors were prevented from exercising their rights while their collateral was depreciating; the trustee and creditor objected to the motion; and the debtor was not likely to be able to fund a plan given his three-year unemployment.

In re Folger*, 2007 Bankr. LEXIS 3667 (Bankr. M.D.N.C. October 16, 2007) (Waldrep, B.J.).*
***Collier on Bankruptcy, 15th Ed. Revised* 3:362.06[3]**

§ 362(d)(3) Automatic Stay; Relief from Stay; Acts Against Single Asset Real Estate by Secured Creditor.

1207-004 (**Commercial**) **Debtor engaged in timber sales was not a single asset real estate debtor and was not subject to expedited proceedings.** (*5th Cir.)*

PROCEDURAL POSTURE: The bankruptcy court denied a motion by creditors to expedite bankruptcy proceedings under 11 U.S.C. § 362(d)(3), finding the chapter 11 debtor was not a "single asset real estate" ("SARE") under 11 U.S.C. § 101(51B). The creditors appealed, then sought certification from the bankruptcy court to the court of appeals under 28 U.S.C. § 158(d)(2). The District Court for the Southern District of Texas then certified the appeal.

OVERVIEW: When the district court certified the case, it had not yet been docketed in the District Court and therefore was still "pending" in the bankruptcy court according to Interim Fed. R. Bankr. P. 8001(f). The proper court to certify the appeal from the bankruptcy court was the bankruptcy court, not the district court. But because the procedure for such certification was a court-promulgated rule, not statutory, the district court's certification did not deprive the appellate court of jurisdiction. The debtor's business activities were extensive and diverse, performing its business on the real estate to sell timber, not the underlying real estate. The timber was not a passive investment. The debtor had over 60 employees and at times hired independent contractors. Sophisticated operations took place such as soil conservation, road planning, design, and engineering. It was substantial business other than the operation of the real property and incidental activities. The timber sales extended beyond a sale of the land. No SARE cases had held a sale of timber to be a sale of the real estate itself, and under Cal. Civil Code § 658, such timber would be treated as goods.

HOC Group of Timber Noteholders v. Pacific Lumber Co. (In re Scotia Pac. Co. LLC)*, 2007 U.S. App. LEXIS 26381 (5th Cir. November 13, 2007) (Davis, C.J.).*
***Collier on Bankruptcy, 15th Ed. Revised* 3:362.07[5]**

§ 365 Executory Contracts and Unexpired Leases.

1207-005 (**Commercial**) **Lease which was terminated by landlord who received eviction order was not subject to assumption.** (*Bankr. S.D. Fla.)*

PROCEDURAL POSTURE: Movant, a landlord, sought relief from stay to allow it to complete prepetition eviction proceedings against defendant debtor, a partnership, that was continuing to occupy premises owned by the landlord and leased to debtor. At issue, *inter alia*, was whether the lease, which the landlord had terminated, was nonetheless subject to assumption under 11 U.S.C. § 365 and whether debtor's motion to so assume the lease was properly granted.

OVERVIEW: The parties' lease commenced in July, 2003. In November, 2006, the landlord sent a termination letter to debtor. It then obtained an eviction order. Though a writ of possession issued, debtor filed bankruptcy before it could be served. When the landlord sought relief from stay to complete the eviction, debtor moved to assume the lease under section 365. The court granted relief to the landlord and denied debtor's motion to assume. First, it held that a prepetition final order or judgment of eviction

extinguished a tenant's right of possession and that once such a final order or judgment was entered, the underlying lease was not an "unexpired lease" that was capable of being assumed in bankruptcy under section 365. In so ruling, the court noted that a landlord might choose not to terminate a lease for purposes of electing remedies but that this did not mean that a tenant retained any property interest that would allow assumption and continued possession in bankruptcy. Finally, it stressed that because, in the case at bar, the landlord had obtained an eviction order, the court was not deciding whether the termination letter, without more, would have prevented a section 365 assumption of the lease.

In re Key Largo Watersports, Inc.*, 2007 Bankr. LEXIS 3590 (Bankr. S.D. Fla. August 10, 2007) (Mark, B.J.).*
***Collier on Bankruptcy, 15th Ed. Revised* 3:365.01**

§ 510(b) Subordination; Purchase or Sale of Securities.

1207-006 (**Commercial**) **Proofs of claim for breach of contract and fraud relating to purchase of memebrship interests in debtor subordinated to those of equity holders.** (*B.A.P. 9th Cir.)*

PROCEDURAL POSTURE: Appellant members sought review of a decision of the Bankruptcy Court for the District of Nevada, which sustained the objection of appellee committee and disallowed the members' proofs of claim for breach of contract and fraud relating to their purchase of their membership interests in the debtor.

OVERVIEW: Investors purchased membership interests in the debtor, a limited liability company, whose insiders failed to invest the money. The committee of equity security holders asserted that the members' proofs of claim were duplicative of their proofs of interest and should have been subordinated. The court concluded that the bankruptcy court erred in disallowing the members' proofs of claim. The court held that the proofs of claim based on potential causes of action for breach of contract and fraud relating to the purchase of membership interests were not duplicative of the proofs of interest for the equity investments even though the interests and claims related to the membership interests and were for the same amount because the members admittedly were not entitled to a double recovery, they were not mere equity holders who filed claims out of confusion, and the issue of relative priority related to whether the claims should have been subordinated, not whether they should have been allowed. The court held that, to the extent 11 U.S.C. § 510(b) applied, it subordinated the claims in priority to a level below equity and beneath all membership interests.

Margaret B. McGimsey Trust v. USA Capital Diversified Trust Deed Fund, LLC (In re Consumer USA Comm'l Mtg. Corp.)*, 2007 Bankr. LEXIS 3700 (B.A.P. 9th Cir. August 15, 2007) (Russel, B.J.).*
***Collier on Bankruptcy, 15th Ed. Revised* 4:510.04**

§ 522(p)(2)(B) Exemptions; Limitation on Homestead Exemption; Applicability; Exceptions; Interest Transferred From Prior Residence.

1207-007 (**Consumer**) **Transfer of homestead interest from one property to another in the same state did not trigger limit.** (*Bankr. N.D. Fla.)*

PROCEDURAL POSTURE: Plaintiff trustee filed an action against defendants, a debtor and his spouse, alleging that the debtor's exemption in his homestead real property was limited to $125,000, pursuant to 11 U.S.C. § 522(p), after the debtor claimed a homestead exemption under Fla. Const. art. X, § 4(c). The debtor filed a motion for partial summary judgment.

OVERVIEW: The debtor and his wife acquired title to the property at issue in 1995. The debtor and his wife resided in a home in Tallahassee, Florida, until June, 2005. During the 1215 days before the filing of the debtor's petition, the debtor and his wife moved into the property at issue and designated it their homestead. When the petition was filed, the property was worth about $4.5 million and was encumbered by approximately $2.05 million in debt. There was no evidence that any equity was transferred from the Tallahassee home to the property at issue. The court held that under the circumstances of the case the debtor was not limited to the $125,000 exemption under 11 U.S.C. § 522(p). The debtor transferred his homestead interest from his prior Florida residence to the property at issue, both of which were located in Florida. The $125,000 cap did not apply to an interest transferred from residences that were both located in the same state, pursuant to 11 U.S.C. § 522(p)(2)(B). The debtor's action merely resulted in the acquisition of homestead status in the property at issue, and the acquisition of that status, by itself, did not invoke imposition of the section 522(p) cap.

Venn v. Reinhard (In re Reinhard), *2007 Bankr. LEXIS 3689 (Bankr. N.D. Fla. October 16, 2007) (Killian, B.J.).*
***Collier on Bankruptcy, 15th Ed. Revised* 4:522.13[2]**

§ 523(a)(6) Exceptions to Discharge; Types of Debt Excepted; Willful and Malicious Injury to Another Entity or Property of Another Entity.

1207-008 (**Consumer**) **Removal of parts from truck caused damage to collateral so that debt was nondischargeable.** (*Bankr. W.D. Mo.)*

PROCEDURAL POSTURE: Plaintiff creditor filed an adversary proceeding against defendants, husband and wife debtors, seeking a determination that its debt was nondischargeable pursuant to 11 U.S.C. § 523(a)(6) and that the debtors be denied a discharge under 11 U.S.C. § 727(a)(2). Because the complaint involved only actions taken by the husband (debtor) and there was no evidence that the wife participated in the actions, the debt was discharged as to the wife.

OVERVIEW: The crux of the creditor's complaint was that the debtor damaged its collateral, a pick up truck, by intentionally removing numerous parts from the truck including the original truckbed with its flare sides, tailgate, taillights, bumper and hitch. The debtor's destruction or misuse of fully-encumbered property (and property with no equity) did not warrant denying him a general discharge under 11 U.S.C. § 727 because such acts, while harming the secured creditor, would not have caused harm to the unsecured creditors whom the section sought to protect. However, denial of discharge was warranted under 11 U.S.C. § 523(a)(6). Removal of the various parts of the truck was substantially certain to cause economic harm to the creditor as the absence of these items would have substantially affected its value. Thus, the damage was done with an intent to injure the creditor. Based on the extent of the damage and the debtor's failure to correct or repair the damage prior to the repossession, the debtor had the requisite intent to satisfy the "malicious" requirement of section 523(a)(6). Finally, the proper measure of damages was the cost of repairs, not the entire amount of the debt.

Bank of Iberia v. Jeffries (In re Jeffries), *2007 Bankr. LEXIS 3649 (Bankr. W.D. Mo. October 17, 2007) (Dow, B.J.).*
***Collier on Bankruptcy, 15th Ed. Revised* 4:523.12**

1207-009 (**Consumer**) **State court judgment based on debtor's willful and malicious exercise of dominion and control over creditor's collateral was nondischargeable.** (*Bankr. S.D. Fla.)*

PROCEDURAL POSTURE: Plaintiff, a judgment creditor of the debtor, brought a claim asserting that the judgment debt was nondischargeable under 11 U.S.C. § 523(a)(6). The issue before the court is whether collateral estoppel applied to establish that the debt, based on a default judgment, was nondischargeable as a willful and malicious injury.

OVERVIEW: The default judgment was entered in a New York State court for, among other things, conversion of the creditor's collateral, primarily motor vehicles. The creditor asserted that the portion of the New York Judgment for conversion, amounting to $744,359, constituted a debt for willful and malicious injury to the property of another and therefore was nondischargeable under section 523(a)(6). The debtor had personally guaranteed the line of credit and the guaranty he executed had provided that he submitted to the jurisdiction of the federal and state courts in New York State. The debtor did not dispute that he was properly served in the New York court or that he failed to respond to the complaint. The court found that, in exercising dominion and control over the creditor's collateral, he had acted with malice, insult, and reckless and willful disregard for the rights of the creditor. The requirements of collateral estoppel had been met, and the entry of summary judgment in the bankruptcy court was appropriate.

Citicorp Leasing, Inc. v. DeMeo (In re DeMeo), *2007 Bankr. LEXIS 3589 (Bankr. S.D. Fla. October 15, 2007) (Hyman, C.B.J.).*
***Collier on Bankruptcy, 15th Ed. Revised* 4:523.12**

1207-010 (**Consumer**) **Breach of contract was not an intentional tort and did not render debt nondischargeable.** (*Bankr. D. Minn.)*

PROCEDURAL POSTURE: Plaintiff creditor filed an action against defendant chapter 7 debtors, seeking a judgment finding that a debt one of the debtors owed was nondischargeable under 11 U.S.C. § 523(a)(6). The debtors filed a motion to dismiss the action for failure to state a claim upon which relief could be granted.

OVERVIEW: The creditor sold his accounting practice to a corporation that was owned by one of the debtors. The creditor claimed that the debtor's corporation failed to make payments required by the transfer agreement, and that the debtor stripped the corporation of assets by selling the corporation to a third party. The creditor obtained a default judgment against the corporation in the amount of $92,452, and sued the debtor in state court to enforce that judgment. The debtor declared bankruptcy while the state court action was pending, and the creditor filed an action in the bankruptcy court, arguing that the debtor should be required to pay the judgment the creditor obtained against the corporation, and that the debt was nondischargeable under 11 U.S.C. § 523(a)(6). The bankruptcy court found that the debt was not excepted from discharge under section 523(a)(6). The pleadings showed that the debtor committed breach of contract, not an intentional tort, and section 523(a)(6) pertained to acts that were traditionally treated as intentional torts. The court treated the debtors' motion to dismiss as a motion for summary judgment and granted the motion.

Grobel v. Johnson (In re Johnson)*, 2007 Bankr. LEXIS 3798 (Bankr. D. Minn. November 14, 2007) (O'Brien, B.J.).*
***Collier on Bankruptcy, 15th Ed. Revised* 4:523.12**

§ 523(a)(15) Exceptions to Discharge; Types of Debt Excepted; Debts in Connection with Divorce or Separation.

1207-011 (**Consumer**) **Property settlement that was not a domestic support obligation was a general unsecured claim.** (*Bankr. D. Neb.)*

PROCEDURAL POSTURE: A debtor objected to a claim filed by a creditor, the debtor's former spouse, on the ground that the debt was in the nature of a property settlement and not a domestic support obligation under 11 U.S.C. § 101(14)(A).

OVERVIEW: Pursuant to the terms of the parties' divorce decree, the debtor was obligated to pay the creditor child support and a separate amount to equalize the marital estate of the parties. For the purposes of deciding the issues of discharge and priorities, the court concluded that the separate amount was a property settlement and not a domestic support obligation. Thus, it was an obligation under 11 U.S.C. § 523(a)(15), neither excepted from discharge in the chapter 13 proceeding under 11 U.S.C. §§ 1328(a) and 523(a)(5) nor was it a priority claim under 11 U.S.C. § 507(a)(1)(A). The divorce decree clearly contained a separate provision for child support, while the amount at issue appeared to relate to the assets and liabilities arising from a business operated by the creditor.

In re Dankert*, 2007 Bankr. LEXIS 3632 (Bankr. D. Neb. September 27, 2007) (Saladino, B.J.).*
***Collier on Bankruptcy, 15th Ed. Revised* 4:523.21**

§ 553(a) Setoff; Preservation of Creditor's Right to Offset Mutual Debt.

1207-012 (**Consumer**) **Creditor not entitled to relief from stay to exercise alleged right of setoff against debtor spouse's savings account.** (*Bankr. W.D. Ark.)*

PROCEDURAL POSTURE: Movant creditor, a credit union, sought relief from stay per 11 U.S.C. § 362 or dismissal relative to a voluntary chapter 13 case filed by debtors, a married couple. Specifically at issue was whether the creditor was entitled to relief from stay to exercise an alleged right of setoff per 11 U.S.C. § 553(a) against debtor wife's separate savings account, by which to recoup liabilities arising by reason of debtors' joint checking account.

OVERVIEW: When debtors closed their joint checking account, they owed the creditor over $5000 due to bad checks and related charges. Thus, when debtor wife's postpetition paychecks were deposited into a separate savings account that was opened prepetition, the creditor froze the proceeds until its setoff claim was resolved. It then sought relief from stay to set off the two amounts and alternatively moved for dismissal, but offered no evidence on the latter ground. Noting that a grant of relief of stay per 11 U.S.C. § 553(a) was discretionary, the court applied a four-part test to determine whether relief was proper. While agreeing that the creditor had demonstrated that debtors owed it a prepetition debt by reason of the negative balance in the now-closed checking account, thereby satisfying first part of the section 553(a) test, the court concluded that the creditor had failed to show the second element of a prepetition claim against the creditor. That was because the creditor's argument that the postpetition deposit of the wife's paychecks into the savings account created a prepetition right on debtors' part due to pledge language in a credit union disclosure statement was meritless.

***In re Moore**, 2007 Bankr. LEXIS 3683 (Bankr. W.D. Ark. October 5, 2007) (Barry, B.J.).*
***Collier on Bankruptcy, 15th Ed. Revised* 5:553.03**

§ 707(b) Dismissal of a Case or Conversion to a Case Under Chapter 11 or 13; Substantial Abuse.

1207-013 (**Consumer**) **Debtor could claim full amount of debt payments on house that was intended for surrender.** (*Bankr. D. Minn.)*

PROCEDURAL POSTURE: A debtor filed a voluntary petition under chapter 7, and indicated that her monthly expenses exceeded her monthly income by $474. Movant United States Trustee ("UST") filed a motion to dismiss the case, pursuant to 11 U.S.C. § 707(b)(2) and (3), arguing that the debtor was not entitled to claim monthly payments on a house she planned to surrender.

OVERVIEW: When the debtor filed for bankruptcy, she owned a house in Minnesota that she used as a homestead. She stated that she intended to surrender the house to satisfy three debts that were secured by the house, and she claimed that she made monthly payments of $1,543 to service the debts on her house, that she had total monthly expenses in the amount of $4,938, and that her monthly expenses exceeded her monthly income by $474. The UST objected to the debtor's claim of $1,543 to service the debt on her house, arguing that she was entitled to claim a housing expense in the amount of $817, the Internal Revenue Service Housing and Utilities Standards for Ramsey County, Minnesota, because she intended to surrender her house. The court found that the debtor was entitled to claim the full amount she paid to service the debt on her house because, at the time she filed her petition for bankruptcy and the UST filed his motion, the debtor was under a contractual obligation to pay those debts. When that amount was included in her monthly expenses, her expenses exceeded her income, and there was no basis under 11 U.S.C. § 707(b)(2) or (3) for denying a discharge.

***In re Pilarski**, 2007 Bankr. LEXIS 3797 (Bankr. D. Minn. November 14, 2007) (Kishel, B.J.).*
***Collier on Bankruptcy, 15th Ed. Revised* 6:707.05**

1207-014 (**Consumer**) **Expensive vehicle leases of cars used to transport show dogs for debtor husband's low paying job would prevent payment to unsecured creditors and resulted in bad faith dismissal.** (*Bankr. N.D. Iowa)*

PROCEDURAL POSTURE: The United States Trustee ("UST") moved to dismiss the debtors' chapter 7 case pursuant to 11 U.S.C. § 707(b)(1) and (3) on the grounds that the filing constituted a substantial abuse of the provisions of chapter 7.

OVERVIEW: The debtors' leased two expensive new 2007 sports utility vehicles shortly before filing their bankruptcy petition, one within 12 days of filing and the other within 90 days. The monthly payment on these two vehicles was $1,841.18 for four years. This was more than $1,000 per month in excess of the IRS allowance for ownership of two vehicles over a 60-month period. They rationalized the leases by claiming gas mileage improvement over their previous vehicle, four-wheel drive capability, and the size of the vehicle to accommodate their show-dog hobby. They provided no testimony that they looked at any less expensive four-wheel drive vehicles. The lease enabled the husband debtor to hold a part-time job that provides at best $899.17 in gross income per month. Thus, for the purpose of giving the husband "something to do" and in order to transport the couple's show dogs, the debtors planned to avoid paying anything to their unsecured creditors. This showed bad faith. The cost of the leases was neither reasonable nor necessary and bore no fair relationship to the debtors' income.

***In re Worrel**, 2007 Bankr. LEXIS 3808 (Bankr. N.D. Iowa November 9, 2007) (Edmonds, C.B.J.).*
***Collier on Bankruptcy, 15th Ed. Revised* 6:707.05**

§ 707(b)(3) Dismissal of a Case or Conversion to a Case Under Chapter 11 or 13; Substantial Abuse; Considerations When Presumption Does Not Apply.

1207-015 (**Consumer**) **Chapter 7 case ordered converted to chapter 13 or converted on grounds of abuse where debtors spent tax refund on personal items and sought to maintain expensive home at expense of unsecured creditors.** (*Bankr. N.D. Ohio)*

PROCEDURAL POSTURE: United States Trustee filed a motion to dismiss a chapter 7 debtors' case pursuant to 11 U.S.C. § 707(b)(3).

OVERVIEW: Debtors had two mortgages on their home. While contemplating bankruptcy, the debtor's spent their $8,000 tax refund in the 16-day period prior to the petition date on unidentified personal items. The debtor wife owned a business. Although neither debtor knew or understood much about the business, both knew that it had never made a profit since it was purchased nearly a year and a half before the petition date. In granting the trustee's motion to dismiss, the court held that the totality of the debtors' circumstances constituted an abuse of the chapter 7 process. The court held that, with belt-tightening, the debtors should have some amount to repay a portion of their debts out of future earnings and still have sufficient funds to provide adequate food, shelter, and clothing for themselves and their children. The court held that it was an abuse of the chapter 7 process to continue to maintain an expensive home at the expense of unsecured creditors. The court also held that the debtors' conduct regarding the tax refund and the business constituted abuse under the totality of circumstances.

***In re Hoelzel**, 2007 Bankr. LEXIS 3640 (Bankr. N.D. Ohio September 27, 2007) (Woods, B.J.).*
***Collier on Bankruptcy, 15th Ed. Revised* 6:707.05[3]**

§ 1301(c) Stay of Action Against Codebtor; Relief from Stay.

1207-016 (**Consumer**) **Relief from stay and co-debtor stay granted to allow ejectment proceedings against debtor and spouse.** (*Bankr. E.D. Pa.)*

PROCEDURAL POSTURE: Before the court was a motion filed by movant, a property services company, to dismiss this bankruptcy case with a 180-day bar against future filings. Alternatively, it sought relief from the bankruptcy stay as well as relief from the co-debtor stay pursuant to 11 U.S.C. § 1301(c), in order to prosecute an ejectment action against debtor and her husband pending in state court.

OVERVIEW: The court first turned to the company's request to terminate the stay. The company claimed a right under Pennsylvania law to immediate possession based upon conveyance of a sheriff's deed to the property concerned. It commenced an ejectment action to gain such possession and preliminary objections to the complaint were denied by a state court. The instant court determined that the prepetition rulings of the state court, along with the terms of debtors' proposed chapter 13 plan as they concerned the company rendered inappropriate the continuation of the stay regarding the realty. Therefore, it was appropriate to terminate the stay under 11 U.S.C. § 362(d)(1). The company also sought relief from the stay as to debtor's spouse. The court stated that the company could prevail on at least two of the three grounds listed in 11 U.S.C. § 1301(c). Accordingly, the company was authorized to proceed in its ejectment action against him. Finally, the better exercise of discretion was to deny without prejudice the motion to dismiss and to afford debtor a limited opportunity to confirm a chapter 13 plan, at which time the good faith issue under 11 U.S.C. § 1325(a)(7) could be considered.

***In re Dunlop**, 2007 Bankr. LEXIS 3655 (Bankr. E.D. Pa. October 16, 2007) (Fox, B.J.).*
***Collier on Bankruptcy, 15th Ed. Revised* 8:1301.03**

§ 1307(c) Conversion or Dismissal; For Cause.

1207-017 (**Consumer**) **Case filed twelve days after dismissal of prior case dismissed with three-year filing ban due to bad faith.** (*Bankr. N.D. Cal.)*

PROCEDURAL POSTURE: The United States Trustee and the chapter 13 trustee filed motions to dismiss the chapter 13 bankruptcy case of the debtor as a bad faith filing under 11 U.S.C. §§ 1307(c) and 349(a), and also sought the imposition of a five-year bar to any refiling by the debtor. The debtor sought dismissal of the case also.

OVERVIEW: The debtor filed the current case twelve days after the dismissal of his most recent prior case. The trustees argued that the debtor's actions were part of a concerted effort by his family and others to prevent a foreclosure of certain real properties, which involved some 22 bankruptcy cases filed since 1998. There were already several refiling bars against several of the debtor's other family members. The family members had admitted that stifling foreclosure was the sole purpose of their many bankruptcy filings. The court found that there was sufficient evidence to consider the multiple bankruptcy filings in determining the totality of the circumstances regarding the debtor's bad faith. However, there was sufficient cause to find bad faith based solely on the actions of debtor alone. Debtor had never come close to confirming a plan in any of his six prior bankruptcy cases. The court decided that a three-year refiling bar was appropriate.

In re Craighead, *2007 Bankr. LEXIS 3657 (Bankr. N.D. Cal. October 16, 2007) (Weissbrodt, B.J.).*
***Collier on Bankruptcy, 15th Ed. Revised* 8:1307.04**

§ 1325 Confirmation of Plan.

1207-018 (**Consumer**) **Above median debtor with lack of current disposable income was not required to adhere to five year applicable commitment period.** (*Bankr. N.D.N.Y.)*

PROCEDURAL POSTURE: A bankruptcy debtor proposed a chapter 13 plan which provided for an applicable commitment period ("ACP") of three years, but the bankruptcy trustee asserted that the ACP for the above median debtor under 11 U.S.C. § 1325 was five years unless all allowed unsecured creditors were paid in full. The trustee objected to confirmation of the debtor's plan.

OVERVIEW: It was undisputed that the debtor was an above median debtor with negative disposable income, and the debtor contended that she had no projected disposable income to devote to the plan for the ACP because she had no disposable income based on current monthly income less expenses. The trustee argued that the debtor's current lack of disposable income did not preclude projected disposable income, and the debtor was statutorily required to commit such projected disposable income to the plan for five years. The bankruptcy court held that the debtor's lack of projected disposable income precluded any requirement that the debtor's ACP under the plan be five years, despite the lack of full payment to unsecured creditors. Since the debtor currently had no disposable income, there could be no projected disposable income based on historical numbers and thus the statutory ACP was not germane.

In re Green, *2007 Bankr. LEXIS 3688 (Bankr. N.D.N.Y. August 29, 2007) (Littlefield, B.J.).*
***Collier on Bankruptcy, 15th Ed. Revised* 8:1325.01**

§ 1325(a) Confirmation of Plan; Conditions for Confirmation.

1207-019 (**Consumer**) **Creditors' objections to confirmation overruled where plan specifically accepted amounts including interest as set forth on proof of claim.** (*Bankr. D. Mont.)*

PROCEDURAL POSTURE: Two secured creditors objected to the amended chapter 13 plan proposed by debtors on the grounds that the plan payments did not include all interest due to the date of confirmation.

OVERVIEW: Under the plan, the debtors' real property would remain property of the bankruptcy estate until sold, and the impaired secured creditors would retain their liens until the secured claims allowed under 11 U.S.C. § 506(a) were paid in full with interest. The court concluded that the creditors' objections were without merit because the plan specifically accepted the amounts, including interest, filed by each of the secured creditors on their proofs of claim. Pursuant to 11 U.S.C. § 507, the unsecured claims would be paid from the surplus of sale proceeds and plan payments. The chapter 13 trustee consented to the plan on the basis that it was proposed in good faith and that the debtors appeared to be able to make the proposed payments. The court concluded that the plan complied with the confirmation provisions and criteria of 11 U.S.C. § 1325(a)(1) through (a)(9).

In re Hayes, *2007 Bankr. LEXIS 3579 (Bankr. D. Mont. October 12, 2007) (Peterson, B.J.).*
***Collier on Bankruptcy, 15th Ed. Revised* 8:1325.01**

1207-020 (**Consumer**) **Purchase money security interest in 910 vehicle could not be bifurcated once cost of GAP insurance was deducted.** (*Bankr. M.D. Fla.)*

PROCEDURAL POSTURE: A debtor filed a petition for relief under chapter 13. The debtor had purchased a vehicle less than 910 days prior to the filing of her case and the finance contract for the vehicle had been assigned to a creditor. The creditor filed a claim in the proceedings, and the debtor filed a motion for valuation of the creditor's claim. The court held a hearing and issued findings of fact and conclusions of law.

OVERVIEW: The debtor purchased the vehicle and entered into a financing contract for $11,339, including $500 for GAP insurance. The creditor filed a proof of claim in the amount of $11,499. The debtor alleged that the vehicle had a replacement value of $4,570. The creditor objected to the debtor's motion to value the claim, and the creditor relied upon the hanging paragraph of 11 U.S.C. § 1325(a). The creditor contended that the debtor could not value the vehicle for less than the amount owed under the contract. The debtor argued that she could bifurcate the claim under 11 U.S.C. § 506 because she claimed that the

inclusion of the insurance in the financing contract destroyed the creditor's purchase money security interest. The court found that GAP insurance could not be categorized as an item that provided an overall enhancement to the vehicle and could not be construed as part of the purchase price pursuant to Fla. Stat. § 679.1031. Equity required application of the dual status rule, and the creditor's secured claim was reduced by $500 for the amount financed for GAP insurance. The remainder of the claim was a purchase money security interest and could not be bifurcated.

***In re Honcoop**, 2007 Bankr. LEXIS 3656 (Bankr. M.D. Fla. September 19, 2007) (Funk, B.J.).*
***Collier on Bankruptcy, 15th Ed. Revised* 8:1325.01**

1207-021 (**Consumer**) **Hangning paragraph did not apply to financing that included negative financing and GAP insurance so that claim could be bifurcated.** (*Bankr. M.D. Fla.)*

PROCEDURAL POSTURE: A debtor filed for relief under chapter 13. A creditor filed a claim for a total balance of $37,923 for a financing agreement that was issued in connection with the debtor's purchase of a vehicle. The debtor sought valuation of the creditor's claim. The court held a hearing and issued findings of fact and conclusions of law.

OVERVIEW: A few months before the debtor filed for bankruptcy relief, the debtor entered into a finance contract for the purchase of a vehicle. As part of the purchase, the debtor traded in another car, and as a result, the debtor rolled $14,100 in negative equity into the purchase of the vehicle. The debtor was also charged $599 for GAP insurance. The debtor alleged that in her motion to value, the replacement value of the vehicle was $19,925. The debtor also alleged that the hanging paragraph of 11 U.S.C. § 1325(a) did not apply because the claim included negative equity and the GAP insurance premium. The court concluded that the financed negative equity was not part of the price of collateral as set forth in Fla. Stat. § 679.1031. The negative equity was not used to enable the debtor to acquire rights in the collateral. Similarly the GAP insurance was not part of the price of the vehicle and did not improve or enhance the value of the vehicle. The court found that with respect to the negative equity, the transformation rule applied and the creditor did not have a purchase money security interest. The bifurcation rule of 11 U.S.C. § 506 applied.

***In re Blakeslee**, 2007 Bankr. LEXIS 3658 (Bankr. M.D. Fla. September 19, 2007) (Funk, B.J.).*
***Collier on Bankruptcy, 15th Ed. Revised* 8:1325.01**

1207-022 (**Consumer**) **Inclusion of negative equity in financing defeated purchase money security interest status and allowed for bifurcation of debt.** (*Bankr. M.D. Tenn.)*

PROCEDURAL POSTURE: Bankruptcy debtors' proposed chapter 13 plan provided for treatment of a claim of a creditor secured by the debtor's vehicle as secured only to the extent of the value of the vehicle. The creditor objected to bifurcation of its claim into secured and unsecured claims, asserting that 11 U.S.C. § 1325(a) (hanging paragraph referencing paragraph 5) precluded such bifurcation based on the creditor's purchase-money security interest ("PMSI").

OVERVIEW: As part of the transaction for the debtors' purchase of the new vehicle, the contract of sale included financing for the negative equity of a vehicle traded in by the debtors. The debtors contended that the negative equity financing precluded any PMSI of the creditor, but the creditor argued that all amounts financed in the transaction were directly related to the purchase of the vehicle and thus created a PMSI in the creditor. The bankruptcy court held that the exception to bifurcation under the hanging paragraph of section 1325(a) did not apply since the creditor's claim was not secured by a PMSI. The vehicle sale involved separate transactions for financing the purchase of the vehicle and financing the negative equity of the trade-in vehicle, and the price of the collateral did not include the amount financed to pay off the negative equity. Further, the negative equity financing was merely a convenience to the debtor and was not value given to enable the debtors to acquire rights in or use of the vehicle. Thus, since the transaction involved only a partially perfected PMSI, the creditor's claim was not fully secured by a PMSI as required to implicate the exception to bifurcation.

***In re Mitchell**, 2007 Bankr. LEXIS 3809 (Bankr. M.D. Tenn. November 13, 2007) (Paine, B.J.).*
***Collier on Bankruptcy, 15th Ed. Revised* 8:1325.01**

§ 1325(a)(3) Confirmation of Plan; Conditions for Confirmation; Plan Proposed in Good Faith.

1207-023 (**Consumer**) **Confirmation denied due to failure of plan to account for inheritance, debt counseling refund, or portions of IRA.** (*Bankr. D. Mont.)*

PROCEDURAL POSTURE: Debtors filed a petition under chapter 13, and an amended plan for paying their creditors. A trustee was appointed to represent the bankruptcy estate, and he filed an objection to the debtors' plan. During a hearing on the debtors' plan, the debtors amended the plan to increase the amount they proposed to pay their creditors each month.

OVERVIEW: The debtors reported a combined monthly gross income of $6,887 and monthly expenses in the amount of $4,613, and claimed they had $133,418 in unsecured debt, primarily from the use of credit cards, and they proposed to pay their unsecured creditor $550 per month. The trustee claimed that debtors' plan should not be confirmed because it was not filed in good faith, as required by 11 U.S.C. § 1325(a)(3). The court looked at the totality of the circumstances and found that the debtors plan was filed in good faith. That said, the court found that the debtors' plan failed to satisfy section 1325(b)(1)(B) because it did not require the debtors to pay all disposable income they would receive during the applicable commitment period to unsecured creditors. In addition, the court could not confirm the debtors' plan because it did not meet the best interests of creditors test found in 11 U.S.C. § 1325(a)(4). Although the debtors' liquidation analysis accounted for an inheritance one of the debtors received, and for a refund they received from a debt counseling service, it failed to account for portions of an individual retirement account and another account the debtors owned.

In re Chavez*, 2007 Bankr. LEXIS 3582 (Bankr. D. Mont. October 11, 2007) (Kirscher, B.J.).*
***Collier on Bankruptcy, 15th Ed. Revised* 8:1325.04**

§ 1325(a)(5)(B) Confirmation of Plan; Conditions for Confirmation; Allowed Secured Claimholders; Retention of Lien and Distribution of Property.

1207-024 (**Consumer**) **Release of lien language could not be included in chapter 13 plan.** (*Bankr. N.D. Tex.)*

PROCEDURAL POSTURE: A debtor's chapter 13 plan provided a mechanism for creditors secured by lien notations on certificates of title to release their liens under 11 U.S.C. § 1325(a)(5)(B)(i) upon either the debtor's payment of the entire indebtedness owed to the creditor or an entry of discharge under 11 U.S.C. § 1328. A creditor opposed confirmation of the plan in light of the release provision.

OVERVIEW: The creditor had a perfected security interest in the debtor's vehicle, and the chapter 13 plan did not attempt to bifurcate the creditor's claim. Although the debtor asserted that the release provision provided for the timely release of liens and provided some clarity as to a remedy and forum to which he might turn if a secured creditor did not release its lien, the creditor contended that the release provision was too vague, unnecessary, and it improperly attempted to extend the bankruptcy court's jurisdiction. The court concluded that there was sufficient authority under 11 U.S.C. §§ 1322(b)(11) and 105 to allow the inclusion of release-of-lien language in a chapter 13 plan. However, the court refused to accept the provision predetermining its jurisdiction over any potential future dispute as an improper enlargement by judicial decree of its jurisdiction under 28 U.S.C. §§ 1334(b) and 157(a).

In re Garcia*, 2007 Bankr. LEXIS 3767 (Bankr. N.D. Tex. November 9, 2007) (Jones, B.J.).*
***Collier on Bankruptcy, 15th Ed. Revised* 8:1325.06[3]**

§ 1506 Public Policy Exception.

1207-025 (**Consumer**) **Japanese bankruptcy trustee in foreign main proceeding not required to obtain an order before proceeding against debtor's property in the United States.** (*B.A.P. 9th Cir.)*

PROCEDURAL POSTURE: Appellant debtor sought review of a grant of summary judgment entered by the Bankruptcy Court for the District of Hawaii, which ruled that the appellee, the foreign bankruptcy trustee (foreign representative) for debtor's estate in Japan, was not required to obtain an order from a United States court before exercising control over property in the United States owned by the debtor, under chapter 15.

OVERVIEW: The debtor's Japanese bankruptcy proceeding was recognized as a foreign main proceeding. The debtor owned interests in certain Hawaii corporations that held valuable property interests, including substantial interests in two limited partnerships that owned and operated two luxury hotels. The foreign representative presented his credentials to the Hawaii entities, replaced the debtor and others as directors and officers of the Hawaii corporations, and prepared to liquidate the Hawaii assets. Nearly seven months after the Japanese bankruptcy court approved the sale of the first luxury property, and more than a year after the foreign representative exercised his shareholder rights to remove him, the debtor filed a complaint in Hawaii state court. The debtor argued under 11 U.S.C. § 1506 that recognition of the foreign representative should be denied as manifestly contrary to the public policy of the United States. However, the debtor had not articulated a fundamental policy of the United States that was offended by recognizing the Japanese bankruptcy proceeding. Chapter 15 included great flexibility, and allowed a foreign representative to function without court supervision.

Iida v. Kitahara (In re Iida)*, 2007 Bankr. LEXIS 3574 (B.A.P. 9th Cir. September 26, 2007) (Dunn, B.J.).*
***Collier on Bankruptcy, 15th Ed. Revised* 8:1506.01**

11 U.S.C. (Pre-2005 Act)

§ 106 Waiver of Sovereign Immunity.

1207-026 (**Consumer**) **Award of damages against IRS for emotional distress due to violation of discharge injunction vacated due to lack of specific waiver of sovereign immunity.** (*Bankr. D.P.R.)*

PROCEDURAL POSTURE: In a prior judgment, the court awarded the debtors compensatory damages for travel expenses and emotional distress to remedy a violation of the discharge injunction by the IRS. The United States (government) appealed the determination of emotional damages on sovereign immunity grounds, and it was vacated on appeal. On remand, the court reconsidered the issue in light of the First Circuit's opinion.

OVERVIEW: After a hearing at which the IRS agreed that it could be held liable for compensatory damages for violation of the discharge injunction, the bankruptcy court issued a decision and order concluding that the IRS had willfully violated the discharge injunction and awarding damages, excluding punitive damages but including damages for emotional distress, against the IRS pursuant to 11 U.S.C. § 105. The court found that 11 U.S.C. § 106 waived the IRS's sovereign immunity with respect to section 105 relief. The First Circuit reversed the bankruptcy court decision as to the award of damages for emotional distress only, concluding that Congress had not waived the federal government's sovereign immunity for emotional distress damages as a contempt sanction for violation of the discharge injunction. The government argued that the waiver of sovereign immunity must be unambiguous and that the statutory waiver in 11 U.S.C. § 106(a)(3) was ambiguous as to whether it included money damages. The court agreed, rejecting the debtors' argument that the issue was *res judicata.* The order awarding tort damages was void and could be vacated at any time.

In re Torres*, 2007 Bankr. LEXIS 3612 (Bankr. D.P.R. October 9) (Carlo, B.J.).*
***Collier on Bankruptcy, 15th Ed. Revised* 2:106.01**

§ 362 Automatic Stay.

1207-027 (**Consumer**) **Widow and son wilfully violated stay by pursuing rent collection and eviction.** (*D.P.R.)*

PROCEDURAL POSTURE: Appellant, son of a lessor and his widow, challenged the Bankruptcy Court for the District of Puerto Rico's grant of partial summary judgment in favor of appellees, debtors, and against the son based on its finding that the son willfully violated the automatic stay provision 11 U.S.C. § 362 and aided and abetted the widow in actions that constituted a willful violation of the automatic stay.

OVERVIEW: The debtors were informed that their lessor's property was adjudicated to his widow, who expressed her intention to have the debtors evicted and collect the tenants' rent. The debtors maintained that due to that situation they were in arrears in their chapter 13 plan and that that constituted a violation of the automatic stay. The bankruptcy court ordered the widow to cease and desist. The son was substituted for the widow after her death. The appellate court found that the bankruptcy court's decision did not violate the son's substantive due process rights because the debtors had an interest in the lease

agreement at the time they filed for bankruptcy since they had a month-to-month lease, occupied the lot, and made payments. Although the debtors had an equitable interest in the lease agreement for the lot of land, in the structures built and in the rents payments they received for renting the structures built, neither the widow nor her son moved the bankruptcy court to lift the stay before seeking to evict the debtors. Therefore, the bankruptcy court did not err as a matter of law when it considered that the son was subject to the automatic stay provision, 11 U.S.C. § 362.

Vidal v. Alvarado*, 2007 U.S. Dist. LEXIS 82778 (D.P.R. October 26, 2007) (Gelpi, D.J.).*
***Collier on Bankruptcy, 15th Ed. Revised* 3:362.01**

§ 522(g) Exemptions; Exemption of Property Recovered by Trustee.

1207-028 (**Consumer**) **Voluntary fraudulent transfer of debtor's interest in entireties property to spouse could be avoided and property could be sold by trustee.** (*Bankr. N.D. Ill.)*

PROCEDURAL POSTURE: Plaintiff bankruptcy trustee brought an adversary proceeding against defendant spouse of a bankruptcy debtor, seeking to avoid as fraudulent a transfer of the debtor's interest in a jointly owned marital home to the spouse, and seeking authority to sell the property. The trustee and the spouse cross-moved for summary judgment.

OVERVIEW: The spouse admitted that the transfer met the technical elements of a fraudulent transfer but asserted that there was no intent to defraud creditors. The spouse argued that any avoidance of the transfer would restore the interest of the debtor and the spouse to a tenancy by the entirety estate which was beyond the reach of creditors of only the debtor. The bankruptcy court held that avoidance of the transfer to the spouse did not result in a reversion to an exempt tenancy by the entirety, since the transfer to the spouse was voluntary and thus the debtor was precluded under 11 U.S.C. § 522(g) from claiming an exemption in the property after avoidance. Further, a sale of the property was warranted since partition of the marital home was impracticable, a sale of the debtor's undivided interest in the property would realize significantly less for the estate than sale of such property free of the interest of the spouse, and the benefit to the estate outweighed the detriment to the spouse who had independent means of securing other housing.

Maxwell v. Barounis (In re Swiontek)*, 2007 Bankr. LEXIS 3600 (Bankr. N.D. Ill. October 3, 2007) (Cox, B.J.).*
***Collier on Bankruptcy, 15th Ed. Revised* 4:522.12[1]**

§ 523(a)(2)(B) Exceptions to Discharge; Types of Debt Excepted; Fraud; False Financial Statement.

1207-029 (**Commercial**) **Bankruptcy court properly ruled that accounts receivable list provided to lender was not materially false or intended to deceive and that debt was dischargeable.** (*7th Cir.)*

PROCEDURAL POSTURE: Appellant lender sought review of a judgment from the District Court for the Northern District of Illinois, which affirmed a bankruptcy court's decision granting summary judgment in favor of appellee debtor with respect to the lender's adversary complaint alleging non-dischargeability of a debt under 11 U.S.C. § 523(a)(2)(B).

OVERVIEW: The lender loaned $ 207,000 to the debtor and his company. The loan was secured by the company's accounts receivable. When the debtor failed to timely repay the debt, the lender sued and won a default judgment in state court. But before the lender could enforce the judgment, the debtor declared bankruptcy. The lender filed an adversary complaint in the bankruptcy court alleging that the list of the company's accounts receivable was false and misleading, that it fraudulently induced the lender to make the loan, and that as a result, the debt to the lender was not dischargeable. The bankruptcy court granted summary judgment to the debtor, ruling that there was no evidence that the accounts receivable list was materially false or misleading, or that the debtor had an intent to defraud the lender. The district court affirmed. On review, the lender argued that there was evidence suggesting that the accounts receivable list was materially false. However, the court found nothing in the record indicating that any of the listed receivables lacked a basis in fact. The court also determined that there was no evidence that the list was created with an intent to deceive the lender.

Fischer Inv. Capital, Inc. v. Cohen (In re Cohen)*, 2007 U.S. App. LEXIS 26122 (7th Cir. November 9, 2007) (Rovner, C.J.).*
***Collier on Bankruptcy, 15th Ed. Revised* 4:523.08[2]**

§ 523(a)(15) Exceptions to Discharge; Types of Debt Excepted; Debts in Connection with Divorce or Separation.

1207-030 (**Consumer**) **Property settlement obligations in debtor's divorce decree were dischargeable in no asset, no bar date chapter 7 case.** (*Bankr. D. Mont.)*

PROCEDURAL POSTURE: Plaintiff unlisted creditor (creditor) sought partial summary judgment in her adversary proceeding pursuant to 11 U.S.C. § 523(a)(15) seeking to determine the dischargeability of a property settlement debt owed to her by defendant debtor, her former husband.

OVERVIEW: Pursuant to the terms of their divorce decree, the debtor agreed to be responsible for certain financial obligations. The debtor then filed a chapter 7 no asset bankruptcy case in which there was no bar date, and after the discharge was entered, the case was closed. The creditor was not listed in the schedules, and after the case was reopened, she sought to determine the dischargeability of the property settlement debts. The debtor contended that 11 U.S.C. § 523(a)(3)(B) provided no authority for the creditor to pursue her complaint under 11 U.S.C. § 523(a)(15), and the court agreed. The omission by Congress in its 1994 amendments to the bankruptcy code of 11 U.S.C. § 523(a)(15), contained in 11 U.S.C. § 523(c), from 11 U.S.C. § 523(a)(3)(B) did not raise an absurd result in a no asset, no bar date chapter 7 case, and the plain language rule of statutory construction precluded the court from reading 11 U.S.C. § 523(a)(15) into 11 U.S.C. § 523(a)(3)(B). Therefore, the court concluded that the debt had been discharged.

Robuck v. Robuck (Robuck)*, 2007 Bankr. LEXIS 3580 (Bankr. D. Mont. October 12, 2007) (Kirscher, B.J.).*
***Collier on Bankruptcy, 15th Ed. Revised* 4:523.21**

§ 547(b) Preferences; Avoidable Transfers.

1207-031 (**Consumer**) **Mortgage refinance was preferential transfer as trustee's hypothetical judicial lien intervened between original mortgage and refinance.** (*Bankr. W.D. Mo.)*

PROCEDURAL POSTURE: Plaintiff chapter 7 trustee filed an adversary proceeding against defendant creditor seeking to avoid an alleged transfer from the debtor as preferential under 11 U.S.C. § 547(b). The trustee moved for summary judgment.

OVERVIEW: The creditor contended that the transfer at issue, a judicial lien it obtained on the debtor's real property, did not enable it to receive more than it would have in a chapter 7 bankruptcy because it already had an equitable lien on that property as a result of its refinancing of another lender's mortgage on the property. The creditor relied on a case where the court had imposed an equitable lien because the mortgagee loaned money to pay off a prior, valid mortgage, and no liens or encumbrances intervened between the time the mortgagee loaned the money and the time it sought to assert its rights. In the instant case, however, there was an intervening lien, *i.e.*, the trustee's hypothetical judicial lien under 11 U.S.C. § 544. The creditor next argued, also relying on case law, that its equitable mortgage should be treated as an unrecorded assignment, and that the prior lender's unreleased mortgage put the trustee on notice of the creditor's interest, thereby defeating her status as a bona fide purchaser. However, the creditor's situation was different from the case on which it relied because the unreleased mortgage had been satisfied, as opposed to being assigned.

Brown v. Community Nat'l Bank (In re Martinous)*, 2007 Bankr. LEXIS 3647 (Bankr. W.D. Mo. October 17, 2007) (Venters, B.J.).*
***Collier on Bankruptcy, 15th Ed. Revised* 5:547.03**

§ 547(c)(1) Preferences; Exceptions to Avoidance; Contemporaneous Exchange for New Value.

1207-032 (**Consumer**) **Funds received by creditor to be held in trust were preferential not protected by earmarking doctrine from recovery.** (*D. Utah)*

PROCEDURAL POSTURE: Plaintiff bankruptcy trustee argued that certain transfers made to defendant creditor were preferential pursuant to 11 U.S.C. § 547 and fraudulent pursuant to 11 U.S.C. § 548 and Utah Code Ann. § 25-6-5(1)(b). The parties cross-moved for summary judgment. In addition, third party defendants moved to dismiss, the trustee sought remand, and the trustee moved to strike portions of an affidavit.

OVERVIEW: The creditor argued that the funds that he received were held in trust and, thus, that they were not estate property. If the account in which they were held lost its trust character, however, the creditor argued that he could trace his funds under the lowest intermediate balance test. He also contended that a third-party's contemporaneous deposit protected the funds from the preference claim under the earmarking doctrine and under 11 U.S.C. § 547(c)(1). The district court found there was no question that commingling had occurred and that tracing was required. However, it would be inequitable to use the lowest intermediate balance test, a tracing fiction, to allow the creditor to recover over similarly situated creditors simply because he was able to get his funds back before they ran out. He became a creditor when he deposited money into the escrow account in issue and had a claim pursuant to 11 U.S.C. § 101(5)(A). Thus, the transfer was preferential, and it was not excused by the earmarking doctrine as, though a third party made a deposit covering the amount in issue, there was no evidence that the new creditor intended for there to be a contemporaneous exchange.

Rupp v. Mayberry (In re Crocker Cos.)*, 2007 U.S. Dist. LEXIS 83203 (D. Utah November 8, 2007) (Stewart, D.J.).*
***Collier on Bankruptcy, 15th Ed. Revised* 5:547.04**

§ 551 Automatic Preservation of Avoided Transfer.

1207-033 **Trustee could not use section 551 to cure defective judgment lien.** (*W.D. Tex.)*
(**Consumer**)

PROCEDURAL POSTURE: Appellant bankruptcy trustee sought judicial review of a bankruptcy court's order denying in part the trustee's motion to foreclose a preserved lien and an objection to proof of claim of appellee, the Texas Comptroller of Public Accounts (Comptroller). It was the denial of the motion to foreclose that the trustee appealed.

OVERVIEW: The debtors had filed a chapter 7 bankruptcy case. Earlier, one debtor had filed a chapter 11 proceeding that had been dismissed. The pivotal issue was whether the judgment lien was valid and superior to the Comptroller's tax lien. If the judgment lien was not valid and was not superior to the tax lien, the bankruptcy judge's ruling was correct. The trustee did not dispute that the state court judgment was taken and the abstract of judgment was recorded in violation of the automatic stay in the prior bankruptcy proceeding. The state tax lien was properly recorded after the prior bankruptcy case had been dismissed and the stay had been lifted. The stay violation resulted in an invalid judgment lien, which was clearly inferior to the properly perfected state tax lien. The trustee could not use 11 U.S.C. § 551 to cure the defective judgment lien to the detriment of the Comptroller.

Lowe v. Tex. Comptroller of Public Accounts (In re Crump)*, 2007 U.S. Dist. LEXIS 82843 (W.D. Tex. August 15, 2007) (Garcia, D.J.).*
***Collier on Bankruptcy, 15th Ed. Revised* 5:551.01**

§ 727(a)(4)(A) Discharge; Grounds for Denial; Fraud; False Oath or Account by Debtor.

1207-034 **Debtor's failure to disclose assets and material omissions justified denial of discharge but co-debtor spouse was granted a discharge.** (*Bankr. N.D. Okla.)*
(**Consumer**)

PROCEDURAL POSTURE: Plaintiff United States Trustee ("UST") objected to the discharge of defendants, a debtor and his co-debtor, pursuant to 11 U.S.C. § 727(a)(4)(A).

OVERVIEW: The debtor admitted that his bankruptcy schedules were replete with 18 errors and omissions. The court held that the failure to disclose assets and omission of creditors rose to the level of false oath in connection with his bankruptcy case that justified denying a discharge, pursuant to section 727(a)(4)(A). The court held that the debtor possessed an intent to defraud as he failed to fully disclose his assets and liabilities in his bankruptcy pleadings under oath; his testimony that a lease with an option to purchase was nothing more than a ruse established that he knew how to deceive; and he engaged in a concerted effort to conceal assets, including the tax refund, items in a safe, a lease, and claims related to an oil venture, to dispose of assets through the "garage sales" of antiques, loss of a trailer, and gifts to his children, and to conceal creditors, including one who lent him $5,000. The court held that the omissions painted a picture of someone attempting to manipulate the bankruptcy system, hoping to retain assets while saving some of his creditors from the consequences of bankruptcy.

Wieland v. Harvey (In re Harvey)*, 2007 Bankr. LEXIS 3592 (Bankr. N.D. Okla. October 16, 2007) (Michael, B.J.).*
***Collier on Bankruptcy, 15th Ed. Revised* 6:727.04**

§ 1141(a) Effect of Confirmation; Parties Bound by Confirmed Plan.

1207-035 (**Consumer**) **Creditors' state court actions were barred by plan confirmation but were not grounds for sanctions.** (*Bankr. C.D. Ill.)*

PROCEDURAL POSTURE: After the debtors' plan of reorganization was confirmed, two creditors sought further relief in state court by filing petitions seeking a sale in error with regard to real estate taxes. The debtors filed a motion to bar and for sanctions, while the creditors filed a motion to strike and for sanctions.

OVERVIEW: Despite the fact that the debtors' plan of reorganization had been confirmed by the court, the debtors sought further relief. Given the clear language of the plan as to the treatment of the creditors and the binding effect of the plan in the absence of objections by the creditors pursuant to 11 U.S.C. § 1141(a), the court allowed the debtors' motion to bar. The creditors were not permitted to seek further relief in the state court on their claims, and they were bound by the clear terms of the plan. The court found that the authority in 35 Ill. Comp. Stat. 200/21-310(a)(6) and case law was not applicable to support the creditors' assertion because there was a confirmed plan providing specific treatment for the creditors' claims. Although the court found in favor of the debtors in their motion to bar, it concluded that the actions taken by the creditors were not willful and were pursued with the belief that valid legal authority existed to support the relief requested in state court. Thus, the debtors were not entitled to sanctions against the creditors.

In re Jedlink*, 2007 Bankr. LEXIS 3637 (Bankr. C.D. Ill. October 17, 2007) (Fines, B.J.).*
***Collier on Bankruptcy, 15th Ed. Revised* 8:1141.01**